1982

John E. Merrihew v. Salt Lake County et al : Brief of Appellant

Utah Supreme Court

H. Ralph Klemm; Attorney for Appellant-Plaintiff;
Ted Cannon; Attorney for Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN E. MERRIHEW, Plaintiff-Appellant, -vs- SALT LAKE COUNTY PLANNING AND ZONING COMMISSION, LELAND S. SWANER, BUDD M. RICH, GARY D. PALMER, DALE V. JONES, THOMAS BOWEN, VELMA STEELE, WILLIAM MARSH, CLAYNE RICKS & RAY NOBLE, Defendants-Respondents	Case No. 18070

BRIEF OF APPELLANT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT

OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE G. HAL TAYLOR
District Judge

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BRIEF OF APPELLANT

NATURE OF THE CASE

Plaintiff-Appellant seeks the issuance of an extraordinary Writ in the nature of mandamus under Rule 65B(b), Utah Rules of Civil Procedure, to require the defendants-respondents to reinstate and implement the decision of the Board of County Commissioners of Salt Lake County approving his Application for a zoning change.

DISPOSITION IN LOWER COURT

The District Court granted summary judgment in favor of defendants-respondents after ruling that the case presented no genuine issue as to any material fact and that defendants-respondents were entitled to judgment as a matter of law.

RELIEF SOUGHT ON APPEAL

Plaintiff - appellant seeks on this appeal to have the Summary Judgment vacated and set aside and to have the case remanded to the District Court for trial.

STATEMENT OF FACTS

Plaintiff filed his Complaint in the District Court of Salt Lake County seeking the issuance of an Extraordinary Writ in the nature of Mandamus under the provisions of Rule 65B(b), Utah Rules of Civil Procedure. Those named as defendants included all serving members of the Salt Lake County Planning Commission and the Zoning Administrator, Planning Director and Building Inspection Department Director of Salt Lake County. (R.20-29)

The Complaint alleges that plaintiff filed his Application with the Salt Lake County Planning Commission for a zoning change on a small piece of agricultural land in Salt Lake County to enable him to construct a small one-story grocery and fruit store on the property. (R.20) That Application was denied on grounds that (1) the request was in conflict with the County Master Plan, (2) the proposed use was not necessary nor desirable at that location, and (3) the ingress and egress to the site was already dangerous. (R.26)

The denial of the Application was appealed to the Board of County Commissioners. (R.27) That body approved the Application and granted the zoning change, thereby reversing the previous decision of the Salt Lake Planning Commission. (R.29)

Plaintiff was granted a Building Permit and made arrangements to construct the store building on the newly-zoned premises. One day before the construction was to begin, plaintiff was advised by the defendants that his Building Permit had been revoked and that the approval of the zoning change had been withdrawn by the Commission. The reason given for the withdrawal was that the Planning Commission had learned that the legal description in the plaintiff's Zoning Application was not accurate. (R.22)

The Complaint alleges further that the acts of the defendants in withdrawing the zoning change previously approved by the Board of County Commissioners exceeded the jurisdiction of the Planning Commission and abused its discretion. Plaintiff alleged that these actions were arbitrary and capricious in nature. (R.22) Based thereon, plaintiff sought mandamus relief from the court. (R.24)

The Complaint alleges further that the Planning Commission was aware of the actual location of the property that was subject to the zoning change, and that the defendants willfully and intentionally withheld the information about the erroneous property description from the plaintiff and from the Board of County Commissioners until it would be impossible, because of notice requirements, to have the appeal re-heard by the Board of County Commissioners as then constituted. Both of the Salt Lake County Commissioners who voted in favor of the zoning change were leaving office on January 1,

1981, and were being replaced by newly elected officials who were not previously involved in granting the zoning change. The only incumbent County Commissioner had voted against that change. Plaintiff alleged that the defendants were attempting to circumvent the previous decision of the Board of County Commissioners in that manner, all of which was contrary to law and in derogation of the constitutional and legal rights of the plaintiff. (R.22)

Based on the Verified Complaint of the plaintiff, the court entered its Order to Show Cause requiring the defendants to certify to the court a Transcript of the records and proceedings of the administrative body pertaining to plaintiff's Application for zoning change. (R.23) This has never been done, but the Salt Lake County Attorney's Office filed an Answer alleging that the legal description set forth in the Notice of the Zoning Hearing held before the Board of County Commissioners does not accurately describe the plaintiff's property, is confusing and misleading, and does not inform interested parties as to the property which was considered for rezoning. The Answer questions, because of defective notice, the enacting of the zoning ordinance which allowed the zoning change by the Board of County Commissioners. The Answer expressly admits that plaintiff is the owner of certain real property located at approximately 7770 South 2000 East in Salt Lake County. (R.34-37)

Defendants subsequently filed their Motion for Summary Judgment on the ground that there were no material facts in dispute in this action and that defendants were entitled to judgment as a matter of law. (R.68) The Motion was supported by affidavits of some of the defendants, which established that the legal descriptions furnished by the plaintiff were erroneous, a fact which is not disputed in this action. (R.56-67) The affidavit of Roy S. Baty, Jr., states that the street address of 7770 South 2000 East has been given to another person known as Edson Packer. (R.62)

The plaintiff countered with his own Affidavit in opposition to the Motion for Summary Judgment. (R.83-91) This Affidavit states that the property to be rezoned is located at approximately 7770 South 2000 East. Mr. Merrihew pointed out that he resides at 7750 South 2000 East and his father resides at 7790 South 2000 East. The vacant property to be rezoned lies between the residences of the plaintiff and his father, and is located at approximately 7770 South 2000 East. (R.83-84) Again, the Answer admits that plaintiff is the owner of that property. (R.34)

The plaintiff also points out in his Affidavit that Mr. Edson Packer actually resides on a private roadway at least 1/2 mile west of 2000 East. Mr. Merrihew also points out that Mr. Packer has no interest in the property to be rezoned and has no interest in any land located at approximately 7770 South 2000 East.

The address used in the Application was chosen for the purpose of accurately showing the true location of the property rather than to give the property a street address. (R.85)

Mr. Merrihew also points out that he has requested a similar zoning change on the same piece of property on at least two previous occasions. The members of the Salt Lake County Planning and Zoning Commission visited the premises prior to the hearing on each of those previous applications. Both the Planning Commission and the Salt Lake County Board of commissioners visited the property in connection with the present Application for zoning change. (R.85)

Mr. Merrihew also points out that none of the defendants ever raised any question about the location of the property until the 'discovery' of the erroneous property description, and that submission of the erroneous property description did not mislead or misdirect the Salt Lake County Commission or the Salt Lake County Board of Commissioners in their consideration for the zoning change. (R.

Defendants' Motion for Summary Judgment was argued before the Honorable G. Hal Taylor on September 16, 1981. (R.92) After hearing argument of counsel, the Judge granted the Motion for Summary Judgment and remanded the matter to the County Commission. (R.92) Formal judgment was entered by the court on September 23, 1981, dismissing plaintiff's Complaint with prejudice and declaring the zoning enacted by the Board of County Commissioners to be null and

void. The judgment said nothing about the defense of failure to exhaust administrative remedies, and the court apparently did not base its judgment on that defense. (R.94)

This appeal was timely filed on October 16, 1981. Plaintiff contends on this appeal that the pleadings and affidavits on file with the court raise material questions of fact to be resolved by the court at trial, and that defendants' Motion for Summary Judgment should have been denied. (R.96)

ARGUMENT

POINT NO. I

THE DISTRICT COURT ERRONEOUSLY ENTERED SUMMARY JUDGMENT FOR DEFENDANTS-RESPONDENTS BECAUSE THERE WERE GENUINE ISSUES OF FACT TO BE DECIDED BY A TRIAL OF THIS ACTION WHEN THE CASE WAS CONCLUDED BY THE COURT.

Rule 56(c), Utah Rules of Civil Procedure, defines the circumstances under which the court may enter Summary Judgment in a pending legal action. The applicable language reads as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In construing and applying this Rule, the Utah Supreme Court has carefully defined and limited the circumstances under which Summary Judgment is appropriate. In the recent case of Grow v. Marwick Development, Inc., 621 P.2d 1249, the Utah court

pointed out that Summary Judgment can only be granted when there is no dispute as to a material fact. The language of the court elaborating on this principle is as follows:

> "It is a well-settled principle of law that summary judgment can only be granted when there is no dispute as to a material fact. Russell v. Park City Utah Corp., 29 Utah 2d 184, 506 P.2d 1274 (1973); Controlled Receivables, Inc. v. Harman, 17 Utah 2d 420, 413 P.2d 807 (1966). The purpose of summary judgment is to save the expense and time of the parties and the court, and if the party being ruled against could not prevail when the facts are looked at most favorably for his position, then summary judgment should be granted. Holbrook Co. v. Adams, Utah, 542 P.2d 191 (1975). If there is a question of fact raised by the pleadings or affidavits, the court is precluded from granting summary judgment. Hatch v. Sugarhouse Finance Co., 20 Utah 2d 156, 434 P.2d 768 (1967)."

In W. M. Barnes Company v. Ohio Natural Resources Company, 627 P.2d 56, the court pointed out that the district court has no right to weight disputed evidence or determine the credibility of witnesses in ruling on a motion for summary judgment. In this regard, the court stated as follows:

> "On a motion for summary judgment, it is not appropriate for a court to weigh disputed evidence concerning such factors; the sole inquiry to be determined is whether there is a material issue of fact to be decided. Holbrook Co. v. Adams, Utah, 542 P.2d 191 (1975). In making that determination, a court should not evaluate the credibility of the witness. It is of no moment that the evidence on one side may appear to be strong or even compelling, and documentary evidence is not dispositive if the intent and purpose underlying the documents are at issue. Kjar v. Brimley, supra."(27 U.2d 411, 497 P.2d 23)

In the case of Holbrook Co. v. Adams, 542 P.2d 191, which is cited extensively in most later cases dealing with summary judgment,

the court emphasized the importance of allowing issues of fact to be decided by the jury. We quote from the decision as follows:

> ". . . it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact. This is analogous to the elemental rule that the fact trier may believe one witness as against many, or many against one.
>
> * * * * * *
>
> It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail. Only when it so appears, is the court justified in refusing such a party the opportunity of presenting his evidence and attempting to persuade the fact trier to his views. Conversely, if there is any dispute as to any issue, material to the settlement of the controversy, the summary judgment should not be granted."

The Utah case of Frederick May & Company v. Dunn, 13 U.2d 40, 368 P.2d 266, points out that the court must view the pleadings, evidence, admissions and inferences therefrom in a light most favorable to the loser, and that the record must preclude, as a matter of law, all reasonable possibility that the loser could win if given a trial.

Applying the tests laid down by this court in the above cases, it appears that the District Judge was in error when he granted Summary Judgment in favor of the defendants in this action. The pleadings and affidavits on file herein raised questions of fact pertaining to whether the public and the Commissioners were aware of the accurate location of the property and whether they were mislead or confused by the inaccurate legal description. There were other factual questions about the arbitrary and capricious nature of the action taken by defendants and about whether defendants intentionally violated the

constitutional and legal rights of the plaintiff.

A. Location of property.

Although plaintiff has conceded that the legal description on the Application for zoning change was not accurate in all respects, he has not thereby suggested or agreed that the Application did not adequately describe the property for interested persons or that the Application mislead or confused interested parties as to its actual location. The Application states that the property is located at 7770 South 2000 East in Salt Lake County. (R.84) This piece of property is well known to the Salt Lake County Planning Commission. Mr. Merrihew has requested a similar zoning change on the same piece of property on at least two previous occasions. Those previous applications were denied, but in each instance the members of the Salt Lake County Planning Commission visited the premises to make an on-site inspection of the property prior to the hearing held on the application. In connection with the present application, the Salt Lake County Planning Commission and the Salt Lake County Board of Commissioners both visited the property described in the Application before their separate rulings were made on the zoning change. Until the 'discovery' of the erroneous property description, none of the defendants in this action ever raised any question about the location of the property. Attached to the Merrihew Affidavit as Exhibit B, is a map that was prepared by the Salt Lake County Planning

Commission in connection with plaintiff's Application for Zoning Change.(R.88) The circled area of that map shows the exact location of the property which plaintiff asked to have rezoned. That Exhibit was prepared by the planning staff, and we can presume that they knew the location of the property which they so accurately outlined on their map. (R.85-86)

In an effort to show their confusion as to the location of the property, the defendants filed the Affidavit of Roy S. Baty, Jr., who points out that the address on the Application of 7770 South 2000 East was given to property owned by Edson Packer on June 7, 1972. On the other hand, Mr. Merrihew states in his Affidvait that he resides in a home at 7750 South 2000 East while his father resides at 7790 South 2000 East. The property between the two homes is vacant land that is owned by the plaintiff. Its approximate location is 7770 South 2000 East. That address was used in the Application because it most nearly described the street address of the proposed store building. (R.85-86)

The conflicting affidavits of Roy S. Baty, Jr. and John E. Merrihew raise issues of fact regarding whether the Board knew the precise location of the rezoned property and whether adjoining land owners were confused or mislead by the erroneous legal description.

Neither the Utah statutes nor the Salt Lake County Zoning Ordinances specify the form of the notice to be published and given to the public in connection with appeals made to the Board of County

Commissioners on zoning matters. The Revised Ordinances of Salt Lake County, 1966, §22-1-2, specifies the appeal procedures. It provides that any person shall have the right to repeal from any decision rendered by the Salt Lake County Planning Commission by filing an appeal in writing within 10 days after the decision with the Board of County Commissioners. The ordinance provides further that the Board of County Commissioners may set a date for a public hearing, notice of which will be published in a newspaper of general circulation within the county at least 30 days prior to the hearing.

In the case of Naylor v. Salt Lake City Corporation, 17 Utah 2d 300, 410 P.2d 764, the Utah Supreme Court held that the notice of a zoning ordinance was proper and adequate even though the notice incorrectly stated the reclassification that was desired. The notice advised that the proposed change was from R-6 to C-3, while the zoning was actually changed from R-6 to B-3. Plaintiffs claimed that since the notice was erroneous, the zoning change was void. This court noted that the plaintiffs had suffered no disadvantage because they had had actual notice of the change made and had participated in the hearings before the Board of County Commissioners.

Utah law in this regard is similar to cases decided in other states. In Capps v. City of Raleigh, 241 SE.2d 527, 531, the North Carolina court held that since the zoning ordinance in question did not require a metes and bounds description, then a general notice designating the area to be affected by the zoning change was sufficient to put property owners in the vicinity on notice that their property may be rezoned.

In Sweetman v. Town of Cumberland, 364 A.2d 1277, the court laid down a test for the sufficiency of notice to be given in zoning cases. The plaintiff contended that the notice to neighboring landowners was insufficient because it did not describe the land by metes and bounds. The court stated that the notice in zoning cases must be sufficient to inform the ordinary layman lacking experience in zoning matters of the property affected and the changes sought. A metes and bounds description is not needed to satisfy this test. Significant here was the fact that notice was mailed to all adjoining landowners having property within 200 feet of the zoned property.

The courts of Florida held an ordinance valid despite the fact that the description of the property affected by it was different from the property described in the notice pursuant to which it was passed. See Bregar v. Britton, 75 So.2d 753, Cert Den 348 US 972, 99 L.Ed 757, 75 S.Ct. 534.

In Closterman v. Cranford Township, 22 NJ Super 204, 91 A.2d 646, the New Jersey court affirmed a judgment upholding the validity of a zoning ordinance even though the legal description was inaccurate. The court noted that the monumenting in the notice was sufficient, since the street lines of the property constituted monuments and correctly delineated the property. The court found no irregularities in the notice of the ordinance and said the purpose of the statutory notice is to give citizens notice of the

consideration of the ordinance and an opportunity to be heard. Since the facts showed that citizens appeared in substantial numbers at the hearing, then the purposes of the statute had been served. See also Helms v. Charlotte, 255 NC 647, 122 SE.2d 814, 96 ALR2d 439.

In Ciaffone v. Community Shopping Corporation, 195 VA. 41, 77 SE.2d 817, 39 ALR2d 757, the Virginia court rejected the contention that a zoning ordinance was invalid because notice of the exact property to be affected by it had not been published in accordance with the state enabling statute where the trial judge had found that the property was described with reasonable certainty and sufficient definiteness to be identified. See also 2525 East Avenue Inc. v. Brighton, 33 MISC 2d 1029, 228 NYS2d 209, 17 APP DIV 2d 908, 233 NYS2d 759.

In Carson v. Board of Appeals, 321 Mass. 649, 75 NE2d 116, the Massachusetts court held that notice of hearing on a petition for a special permit for the erection and maintenance of a garage was adequate even though the street adress stated therein was erroneous. It appeared that the subject property had once been part of a large tract which fronted on Bedford Street and that the entire tract was numbered 47-49 Bedford Street. Prior to the filing of the petition for the special permit, the owner had sold off the portion fronting on Bedford Street, leaving the property to be rezoned fronting on Camellia Place, which ran easterly from Bedford

Street. The court said the notice was sufficient even though the land did not front on Bedford Street because the remaining land was still being taxed as if it were located at 47-49 Bedford Street. The court said the description in the petition and notice could hardly have referred to any land other than that for which the special permit was requested, since the only other land having the same numbering was the land whcih had already been conveyed to the town. The court also noted that since no one objected to the wrong description at the hearing before the board, then no one could have been mislead by the description.

The case of Tolman v. Salt Lake County, 20 U.2d 310, 437 P.2d 442, seems to establish the Utah test for determining the sufficiency of notice to the public in zoning cases. In expressing its feelings about the notice requirements, the Utah court quoted from Mullane v. Central Hanover Bank, 339 US 306, 70 S.Ct. 652, 94 L.Ed. 365, as follows:

> "The fundamental requisite of due process of law is the opportunity to be heard. * * *
>
> An elementary and fundamental requirement of due process which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. * * * A notice must be of such nature as reasonably to convey the required information * * *and it must afford reasonable time to those interested to make their appearance. (Emphasis by the court.)

The above cases show that a flawless metes and bounds description of the property to be rezoned is not necessary so long

as the recipients of the notice can reasonably ascertain that the subject property may be affected by the enactment. In the case now before the court, the Salt Lake Planning Commission was fully aware of where the property was located. Its members had actual notice of the precise spot where Mr. Merrihew wanted to build the store. Many property owners in the immediate vicinity had participated in the hearings held before the Board of Commissioners of Salt Lake County. The erroneous legal description caused them no inconvenience or loss whatsoever. Defendants didn't even discover the erroneous property description until after the hearings had been held and the decision had been rendered. The fact that there were some errors in the legal description did not void the notice given to the public or nullify the proceedings in which the zoning was changed.

One obvious legal principle appears from reading the many cases cited above. There is no way to determine whether the given notice of a proposed zoning change is adequate or proper without first hearing the facts and circumstances relating thereto. The contradictory information found in the pleadings and affidavits in this case did not give the court sufficient factual basis upon which to rule on the issues as a matter of law.

B. Arbitrary and capricious action of the defendants.

A second question of fact remained to be decided by the trial court before entry of judgment was proper. Plaintiff's Complaint

alleges that defendants willfully and intentionally withheld the information about the erroneous property description from him and from the Board of County Commissioners of Salt Lake County until November 25, 1980, so he could not, because of statutory notice requirements, have his appeal reheard by the Board of County Commissioners as then constituted. The two County Commissioners who voted in favor of the zoning change were scheduled to leave office on January 1, 1981. Through the election process, they had been replaced by newly elected officials who were not previously involved in granting the zoning change. The sole remaining incumbent County Commissioner had voted against the change. Plaintiff alleged that the acts of the defendants in attempting to circumvent the previous decision of the Board of County Commissioners were arbitrary and capricious and were in derogation of the constitutional and legal rights of the plaintiff.

The affidavits of the parteis do not address themselves to this issue. There is no way to determine whether plaintiff's allegations of arbitrary and capricious action are true without hearing facts presented by the parties at the trial of this case. In the case of Naylor v. Salt Lake City Corporation, 16 U.2d 192, 392 P.2d 27, the Utah Supreme Court reversed a Summary Judgment entered in a zoning case. The plaintiff had alleged an abuse of discretion and arbitrary action on the part of the Salt Lake City

Commission in changing the zoning classification of certain real property. This court held that plaintiffs, by their Complaint and by their offer of proof, presented genuine issues to be resolved by the court at the trial. Upon a second appeal of the same case after trial, Naylor v. Salt Lake City Corporation, 17 U.2d 277, 410 P.2d 764, the court held that the evidence at trial supported defendant's claim that the City Commissioners were not guilty of an abuse of discretion. The combination of these two appeals indicates that the questions of arbitrary and capricious actions are to be determined from the facts of the case presented at trial.

POINT NO. II

PLAINTIFF WAS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE FILING THIS ACTION IN THE DISTRICT COURT.

Based upon the case of Lund v. Cottonwood Meadows Company, 392 P.2d 40, 15 U.2d 305, the defendants claimed in their Motion for Summary Judgment that plaintiffs failed to exhaust their administrative remedies before filing suit in the District Court. The cited case was factually different from the instant case. In the Lund case, the court held that plaintiff had not exhausted his administrative remedies because he had failed to appeal a decision of the Planning Commission to the Board of County Commissioners, as required by the applicable ordinance. The court held that an adverse decision of the Planning Commission must first be appealed to the higher administrative tribunal before a suit can be filed to contest that decision.

The facts of the Lund case are much different than the ones now facing the court. Plaintiff in this action first went before the Salt Lake County Planning Commission with his Application for a zoning change. When that change was denied, the decision of the Planning Commission was appealed to the Board of Commissioners of Salt Lake County and was reversed. No appeal was taken from that decision. After the decision was final, the employees of the Planning Commission set it aside without hearing or review because of alleged notice deficiencies. Having taken such administrative action, the defendants now claim that plaintiff must return to the Board of County Commissioners and appeal the decision of the bureaucrat before plaintiff has exhausted his administrative remedies.

The law of exhaustion of administrative remedies does not even apply to this case. The very purpose of Rule 65B, Utah Rules of Civil Procedure, is to provide relief from arbitrary and capricious administration actions such as the one referred to herein. The rule provides for a cause of action separate and apart from any available administrative remedies.

Since it does not appear from the record that the court based its Summary Judgment on defendants' claim that plaintiff has failed to exhaust his administrative remedies, the plaintiff will not elaborate further on this point unless requested to do so by the court.

CONCLUSION

For reasons stated herein, the court should reverse the decision of the District Judge and remand the matter to the District Court for trial.

DATED this 29nd day of January, 1982.

RESPECTFULLY SUBMITTED,

H. RALPH KLEMM
Attorney for Appellant

NOTICE OF SERVICE

Served the foregoing by having two copies thereof delivered to counsel for the defendants-respondents, Kent S. Lewis, 151 East 2100 South, Salt Lake City, Utah, this 26th day of January, 1982.